IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1027 of 1982

with

CIVIL REVISION APPLICATION No 1028 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment ? : Yes

2. To be referred to the Reporter or not? : No

3. Whether Their Lordships wish to see the fair copy of the judgment ? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whetherit is to be circulated to the Civil Judge? :No

BAI CHAMPA WD/O NATWARLAL THAKORLAL SIDHIWALA

Versus

HEIRS OF BHIKHABHAI A MEHTA

Appearance:

1. Civil Revision Application No. 1027 of 1982
MR MD PANDYA for Petitioners
MR SM SHAH for Respondent

2. Civil Revision ApplicationNo 1028 of 1982
MR MD PANDYA for Petitioners
MR SM SHAH for respondent

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 07/03/2000

ORAL JUDGEMENT

Both these Revision Applications are filed against the common judgement of the District Court, Bharuch, passed in Civil Appeal Nos. 150/80 and 151/80 by the District Judge and accordingly, both these revision applications are disposed of by this common judgement.

The facts leading to the present petitions are as under.

1. The petitioners in both these Revision Applications are the tenants of the suit premises. The respondent herein is the owner of the aforesaid suit premises. The suit premises consist of three rooms on the first floor and the same was rented to one Natwarlal Thakorlal Sidhiwala, who is the husband of defendant no.1. The rent was fixed at Rs.30/- per month and said Natwarlal Thakorlal was to pay half the electricity charges and sanitary tax every month. After the death of Natwarlal, defendant no.1 - wife, defendant no.2 - his brother and defendant no.3 - mother were residing in the suit premises. It is alleged by the plaintiff that the defendants are irregular in payment of rent and that they were in arrears of rent for more than six months i.e. for the period between 1-11-1974 to 31-6-1975. The plaintiff, therefore, served a demand notice on 1-7-1975. The defendants paid arrears of rent as demanded in the notice, but thereafter, did not pay the rent for the period of two months. The plaintiff therefore filed the suit being Regular Civil Suit No. 413/1975 for getting possession of the suit premises on the ground of arrears of rent. Another ground which was pressed into service by the plaintiff for getting possession was that the plaintiff's son and daughter are residing on the second floor of the suit premises and that the defendants are making false allegations affecting her married life and therefore, the said act amounts to nuisance. It is also the case of the plaintiff that the defendants are not using the suit premises for the purpose for which it was let. Claim for bonafide requirement was also pressed into service by the plaintiff in the said suit.

2. The defendants appeared in the said suit in response to the notice issued to them by the courts and filed their written statement at Exh.16. They denied the averments made in the suit on various grounds. When the aforesaid suit was pending, the plaintiff filed another

suit being Regular Civil Suit No. 499/76 for obtaining a decree for possession on the ground of arrears of rent and on other grounds. Both the suits were consolidated and the subsequent suit i.e. 499/76 was ordered to be heard with the previously instituted Suit No. 413/75. So far as the second suit is concerned, before instituting the said suit notice of demand was also served on 5.7.1976 and the defendants having failed to pay arrears of rent within one month from the receipt of the notice of demand, the plaintiff had filed the aforesaid second suit.

3. The defendants also resisted the same by written statement at Exh.16 amongst other contentions, it was also contended that second suit was barred by principle of res-judicata or in any case, the second suit was barred under the provisions of Order 2 Rule 2 of the Civil Procedure Code. It was also averred in the written statement that the defendant no.2 was the only tenant in the suit premises and there is a mis-joinder of the parties.

4. The Trial Court framed various issues at Exh.16. So far as the first suit i.e. Regular Civil Suit No. 413/75 is concerned, it was found by the Trial Court that the plaintiff has failed to prove that the defendants are in arrears of rent for the period of more than six months. The Trial Court also negatived the case of the plaintiff for getting decree for possession on the ground of bonafide requirement and on the ground of nuisance. So far as the second suit i.e. Regular Civil Suit No. 499/76 is concerned, the Trial Court came to conclusion that the plaintiff has proved that the defendants are in arrears of rent for more than six months and that the defendants have neglected to pay the rent. Ultimately, on the aforesaid finding about non-payment of rent by the defendants, in so far as the Regular Civil Suit No.499/76 is concerned, virtually the Trial Court passed a decree for possession in favour of the plaintiff. Of Course, the Trial Court has not specified about passing of the decree either in the first suit or in the second suit, but in view of the finding given on various issues, it is clear that the decree was passed in the second suit i.e. Regular Civil Suit No. 499/76. The defendants carried the matter further by way of preferring appeals before the District Court, Bharuch. The defendants preferred two appeals i.e. Regular Civil Appeal Nos. 150/80 and 151/80. So far as the Regular Civil Appeal No. 150/80 is concerned, same was filed against the decree passed in Regular Civil Suit No. 413/75 and so far as the Regular Civil Appeal No. 151/80 is concerned, the same was filed

against the decree passed in Regular Civil Suit No. 499/76. Both these appeals were heard together by the Ld. District Judge, Bharuch. The Ld. District Judge, Bharuch came to the conclusion that so far as the first suit is concerned i.e. 413/75, since the plaintiff had failed to prove his case, the said suit was required to be dismissed and decree could have been passed only in the second suit i.e. Civil Suit No.499/76. However, Ld. Trial Judge had not clearly stated as to in which suit the decree is passed. The Appellate Court allowed both the appeals partly. In so far as the payment of cost is concerned the court set aside the order for the same and the decree for possession was confirmed by the Ld. District Judge. Accordingly, both the appeals were partly allowed by the Ld. District Judge to that extent.

5. Being aggrieved by the aforesaid decree of the Ld.District Judge passed in Regular Civil Appeal Nos. 150/80 and 151/80, the petitioners - original defendants have preferred these two Revision Applications before this Court. In both these Revision Applications the prayer is common i.e. for setting aside the order of the Appellate Court, passed in Regular Civil Appeal Nos. 150/80 and 151/80.

6. I have gone through the judgement of Ld. District Judge as well as Trial Court as well as demand of notice u/s 12(2) of the Rent Act as well as I have gone through the pleadings of the parties and evidence on record.

7. So far as the first suit i.e. Regular Civil Suit No. 413/75 is concerned, it has been found by the Trial Court that the plaintiff has failed to prove his case on all the counts. Therefore, so far as the aforesaid suit is concerned, the said suit was required to be dismissed specifically as there is no substance in the grounds raised in the suit. In that view of the matter, appeal which was filed against the said decree i.e. Regular Civil Appeal No.150/80 is concerned, Appellate Court should have allowed the said appeal. However, the Appellate Court was of the opinion that since the Trial Court has not bifurcated the finding of decree and since it is not possible to know as to in which suit he passed the decree, he merely set aside the order of imposing cost. In my view, it is very clear from the record that so far as the Regular Civil Suit No. 413/75 is concerned, the same was required to be dismissed and in fact, the Trial Court virtually decreed the second suit i.e. 499/76. In that view of the matter, the order of the Ld. District Judge passed in Regular Civil Appeal

No. 150/80 is required to be set aside and so far as Regular Civil Suit No. 413/75 is concerned, the same is required to be dismissed with cost. So far as the Revision Application no. 1027/82 is concerned as per the decree attached with the compilation of said revision application, it is filed against the judgement and order passed in Regular Civil Appeal No. 150/80, which arose out of Regular Civil Suit No. 413/75, since the aforesaid suit was required to be dismissed. The aforesaid revision application is requred to be allowed. Accordingly, the said revision application is allowed and rule is accordingly made absolute. No order as to costs.

8. Now, so far as the other Revision Application No.1028/82 is concerned, the aforesaid revision application has been filed against the order of the ld. District Judge passed in Appeal No. 151/80, which arose out of decree passed in Regular Civil Suit No. 499/76. The aforesaid suit is the subsequently instituted suit. So far as the second suit is concerned, the plaintiff had given a demand notice at Exh. 46 and as per the said notice, defendants were in arrears of rent for the period from 1-9-1975 to 31-7-1976. The defendants had taken defence that they have not received the notice and that they were not in arrears of rent. The plaintiff Bhikhabhai has examined himself and has clearly stated that the defendants were in arrears of rent from 1-9-1975 to 31-7-1976 and did not tender the rent nor have they paid the rent at any time before filing of the said suit. Defendants did not even gave reply to the notice. The Ld. District Judge has found that the defendant nos. 1 and 2 have stepped into witness box and specifically admitted that amount of rent from 1-9-1975 to 31-7-1976 was due. But according to them, the said amount of rent was paid by the defendants to the plaintiff's grandson Harivadan, who had acknowledged the receipt of such payment at Exh.96. It was contended by the plaintiff that the entry at Exh.95 was a got up entry. In that view of the defence in that suit, the Appellate Court has considered whether the defendants have proved the payment of rent. There are certain aspects of the matter which require consideration at this stage. Firstly, even in the past defendants were not regular in payment of rent, it was found by the Appellate Judge that the defendants used to pay the rent at the interval of four to six months as the case may be. In fact, the plaintiff was obliged to file the application u/s 11(4) of the Rent Act for striking the defence of the defendants for non-payment of rent. In this background it was found by the Appellate Court that it was not possible to believe that the defendants must have paid entire rent as shown

as per the entry at Exh.95. It is also found by the Appellate Court that even in the written statement at Exh.16 of the second suit i.e. Regular Civil Suit No.499/76, there is no reference about the said entry at Exh.95 or about any payment to the grandson of the plaintiff Harivadan. It was argued that he should have examined the grandson. The Appellate Judge has discussed the probability of such payment by giving detail reasoning in para-9 of his judgement. In order to reach the conclusion, the Court has also compared the writing by resorting to the provisions of Sec. 76 of the Evidence Act and ultimately, conclusion was arrived at that the said entry was not genuine. The Appellate Court has found that the defendant no.1 in his cross-examination had admitted that the entry at Exh.95 is not in the hand-writing of Harivadan. Defendant no.1 has also stated that it is not possible to infer that he is the author of the said entry at Exh.95. The Court has compared the admitted signature of said Harivadan with the signature in question at Exh. 94 and Ex.95 and ultimately, reached the conclusion that the aforesaid entries are not genuine and is not in the hand-writing of the said Harivadan.

9. The defendants knew that there may a decree for possession against them on the ground of arrears of rent and, therefore, only in order to prove that they were not in arrears of rent, they have created this story. Defendant had examined witness Dahyabhai Narrotam to prove such payment to the grandson of the plaintiff, who is alleged to have accompanied defendant no.2 to the house for the purpose of making payment. The Appellate Court has clearly found that the said witness was not trustworthy and there was no cause for him to accompany the defendant no.2 to go to the house of the plaintiff. On the question of probability also, the Ld. Appellate Court found that the theory of the defendants was not at all probable and detail reasoning is given by the Ld. Appellate Judge in para -2 of his judgement. In that view of the matter, it is not proper for this Court to re-appreciate the entire evidence on record again and take a different conclusion on facts. Even otherwise the reasoning given by the appellate court is based on correct appreciation of the evidence on record and, therefore, I do not see any point in disturbing the decree of the Appellate Court, by which the order of the decree of the Trial Court was confirmed by Ld. Appellate Judge. In view of 31 (1) GLR 209, if in response to the suit notice, if rent is not paid within one month, there is no option but to pass a decree for eviction u/s

12(3)(a) of the Rent Act. The Appellate Court has found that the tenant has failed and neglected to pay rent and the rent was not deposited even during the pendency of the proceedings. It was also found that during the pendency of the second suit, the tenant was very much irregular in depositing rent in the Court. The aforesaid finding is reached by the Appellate Judge in para -11 of his judgement. In that view of the matter, I do find any substance in this revision application. In the revision memo, the petitioner has taken a ground of not considering the provisions of Sec. 5(ii)(c)(i) of the Rent Act. As per the same, after the death of original tenant, the landlord should have given an application for deciding the transmission of tenancy. So far as the tenancy rights are concerned, no such point is taken in the suit notice nor is it taken in the written statement. There is no such issue on the said point and thereafter there is no evidence on the said point. The question cannot be argued for the first time when no issue to that effect is framed. There is, therefore, no substance in the said point. It was argued on behalf of the petitioners that so far as the second suit is concerned, the said suit was barred by the principle of res-judicata as the first suit was pending. However, there is absolutely no substance in the said arguments. The cause of action is different in both the suits. The landlord is entitled to approach to court on the ground of arrears of rent as per the period for which tenants are in arrears of rent. Therefore, it cannot be said that issues in both the suits are similar. The question of res-judicata, therefore, has not seriously pressed before the Trial Court as observed by the Ld. Appellate Judge. Similarly, provisions of Order-2 Rule-2 of the Civil Procedure Code will not come into play because when the first suit was filed, the claim for arrears of rent regarding the period for which the tenant was in arrears of rent at the relevant time. There was no question to include the claim of the second suit while filing the earlier suit. Therefore, there was no question of omission of the claim by the plaintiff and when he filed the second suit, bar of Order-2 Rule-2 of C.P.C. will not apply and, therefore, in my view the second suit is neither barred by the principle of res-judicate nor it is barred by Order-2 Rule-2 of the C.P.C.

10. Lastly, the Learned Advocate requested for giving time to vacate the suit premises on the ground that the petitioners will have to make alternative arrangement for suitable residential accommodation. In the facts and circumstances of the case, I direct that the decree of eviction, may not be executed till 31st March, 2001. The

said time is given on condition that the petitionJJJJJ

today. The petitioners should clearly mention in the said undertaking that they shall hand-over exclusive and peaceful possession of the suit premises to the respondent landlord on or before the aforesaid date. Accordingly, the following order is passed.

11. Civil Revision Application No. 1027/82 is allowed and rule is made absolute. Civil Revision Application No. 1028/82 is dismissed and rule is discharged. No order as to costs in both these revision applications.

(P.B.MAJMUDAR)

(vipul)